

1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF CALIFORNIA  
3

4 In re: ) Case No. 24-22206-B-11  
5 VILLAGE OAKS SENIOR CARE, LLC, ) DC No. FWP-1  
6 Debtor. )  
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8 In re: ) Case No. 24-22208-B-11  
9 EL DORADO SENIOR CARE, LLC, ) DC No. FWP-1  
10 Debtor. )  
11

12 In re: ) Case No. 24-22236-B-11  
13 BENJAMIN L. FOULK, ) DC No. FWP-1  
14 Debtor. )  
15

16 MEMORANDUM DECISION SUSTAINING OBJECTIONS TO DEBTORS'  
17 SUBCHAPTER V ELIGIBILITY

18 I.

19 Introduction

20 Before the court are three objections filed by secured  
21 creditor Gina MacDonald ("Ms. MacDonald").<sup>1</sup> The objections are  
22 filed in the three separate but related subchapter V chapter 11  
23 cases of In re Village Oaks Senior Care, LLC, No. 24-22206  
24 ("Village Oaks"), In re El Dorado Senior Care, LLC, No. 24-22208  
25 ("El Dorado"), and In re Benjamin L. Foulk, No. 24-22236  
26 ("Foulk"). Ms. MacDonald objects to the debtors' eligibility to  
27 be debtors under subchapter V. The crux of Ms. MacDonald's  
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<sup>1</sup>Ms. MacDonald is the ex-wife of Benjamin L. Foulk ("Dr. Foulk"). Alfiya Foulk is Mr. Foulk's current wife.

1 objections are that the debtors are affiliated debtors and their  
2 aggregated noncontingent liquidated debts exceed the statutory  
3 cap of \$7,500,000.00 for subchapter V eligibility under the  
4 version of 11 U.S.C. § 1182 in effect when the debtors filed  
5 their chapter 11 petitions.<sup>2</sup>

6 Village Oaks, El Dorado, and Dr. Foulk filed responses to  
7 Ms. MacDonald's objections. The responses filed by Village Oaks  
8 and El Dorado, both of whom are represented by the same attorney,  
9 mirror each other. The response filed by Dr. Foulk, who is  
10 represented by another attorney, is somewhat different.  
11 Generally, though, each response disputes the debtors' affiliate  
12 status, asserts that aggregated debts fall below the  
13 \$7,500,000.00 subchapter V debt cap, and contends that Ms.  
14 MacDonald waived any objection to the debtors' subchapter V  
15 eligibility.

16 Ms. MacDonald filed replies to the debtors' responses. The  
17 replies filed in the Village Oaks and El Dorado cases mirror each  
18 other. The reply filed in the Foulk case is different. The  
19 replies address each of the arguments raised in the responses.

20 The court heard oral argument on the objections in all three  
21 cases on October 1, 2024. Appearances were noted on the record.  
22 The court has also reviewed and considered the objections,  
23 responses, replies, and all related declarations and exhibits.  
24 The court takes judicial notice of the dockets in the Village  
25 Oaks, El Dorado, and Foulk cases. See Fed. R. Evid. 201(c)(1).

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26  
27 <sup>2</sup>The debt limit to qualify under chapter 11, subchapter V,  
28 was \$7,500,000.00 when the petitions were filed in May 2024.  
That debt limit sunset on June 21, 2024.

1 For the reasons explained below, the court concludes as  
2 follows: (i) Village Oaks, El Dorado, and Foulk are vertically-  
3 affiliated debtors; (ii) Village Oaks and El Dorado are  
4 horizontally-affiliated debtors; (iii) aggregated noncontingent  
5 liquidated debts exceed the \$7,500,000.00 subchapter V debt cap;  
6 and (iv) Ms. MacDonald's eligibility objections are not waived.  
7 Each of Ms. MacDonald's eligibility objections will therefore be  
8 sustained, the three chapter 11 cases will be de-designated as  
9 subchapter V cases, the three chapter 11 cases will no longer  
10 proceed under subchapter V, and the subchapter V trustees will be  
11 discharged. The court also provides notice of its intent to  
12 consider the appointment of a chapter 11 trustee in all three  
13 bankruptcy cases for reasons explained below.

## 14 15 **II.**

### 16 **Statement of Relevant Facts**

17 Village Oaks and El Dorado are limited liability companies.  
18 Dr. Foulk is the sole member-and he owns and controls 100%-of  
19 Village Oaks and El Dorado.

20 The voluntary chapter 11 petition that commenced the Foulk  
21 case was filed on May 22, 2024. The voluntary chapter 11  
22 petitions that commenced the Village Oaks and El Dorado cases  
23 were filed the day before, on May 21, 2024. All three debtors  
24 elected to proceed under subchapter V in their petitions.

25 Dr. Foulk and Village Oaks are borrowers on a loan from  
26 First-Citizens Bank & Trust Company ("First-Citizens") in the  
27 original principal amount of \$3,285,000.00. El Dorado is a  
28 guarantor of that loan.

1 Schedules in the Foulk case were filed with the petition on  
2 May 22, 2024. Schedule D lists a secured debt to First-Citizens  
3 in the amount of \$3,250,000.00. A declaration that Dr. Foulk  
4 also filed in the Foulk case two days later, on May 24, 2024,  
5 states as follows:

6 6. On August 9, 2018, along with Village Oaks, and  
7 Alfiya Bogdanova Laub, Inc., a corporation owned by my  
8 spouse, I entered into a loan agreement with  
9 First-Citizens through a program established by the  
U.S. Small Business Association, and borrowed the sum  
of \$3,285,000 (the "SBA Loan"). El Dorado and Alfiya  
Foulk, my spouse, guaranteed the loan.

10 Foulk, Case No. 24-22236, Docket 21.

11 Dr. Foulk signed the Village Oaks and El Dorado Schedules on  
12 behalf of the respective debtors under penalty of perjury.

13 Schedules in the Village Oaks case were filed on June 4, 2024.  
14 Schedule D lists the amount of the First-Citizens loan as  
15 "unknown."<sup>3</sup> Schedules in the El Dorado case were also filed on  
16 June 4, 2024. These Schedules omit El Dorado's guarantor  
17 liability to First-Citizens on the loan to Dr. Foulk and Village  
18 Oaks.<sup>4</sup>

19 During oral argument, the attorney representing Village Oaks  
20 and El Dorado had no explanation why Village Oaks would schedule  
21 the amount of its obligation to First-Citizens as "unknown" when  
22 Dr. Foulk included the amount of that debt in Schedules and in a  
23 declaration filed two weeks earlier in his own chapter 11 case.

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25 <sup>3</sup>Amended Schedule D filed on August 19, 2024, also lists  
26 Village Oaks' debt to First-Citizens as "unknown."

27 <sup>4</sup>Amended Schedules filed on August 19, 2024, also fail to  
28 list El Dorado's guarantor liability on the First-Citizens loan  
to Village Oaks and Dr. Foulk.

1 There also was no explanation why El Dorado would not schedule  
2 its guarantor liability on the First-Citizens loan when, again,  
3 Dr. Foulk identified El Dorado's guarantor liability in a  
4 declaration filed two weeks earlier in his own chapter 11 case.  
5 The same attorney also conceded that, if aggregated, the debts of  
6 the debtor entities exceed the \$7,500,000.00 subchapter V debt  
7 cap. Dr. Foulk's attorney largely adopted these arguments and  
8 also provided no explanation or justification for scheduling the  
9 First-Citizens debt in the Village Oaks Schedules as "unknown" or  
10 for the omission of the First-Citizens guarantor debt from the El  
11 Dorado Schedules.

12 Ms. MacDonald made her initial appearance in the El Dorado  
13 and Foulk cases on June 6, 2024. She made her initial appearance  
14 in the Village Oaks case the following day, on June 7, 2024.

15 Following Ms. MacDonald's initial appearance in each of the  
16 three bankruptcy cases, on June 10, 2024, she opposed the  
17 debtors' then pending cash collateral and wage payment motions.  
18 She questioned the debtors' subchapter V eligibility in all three  
19 oppositions.

20 With regard to the cash collateral and wage payment motions,  
21 specific and common to each were assertions that estate funds  
22 consisting of cash collateral should not be used to pay the  
23 insider salaries of Dr. Foulk or the current Mrs. Foulk. Ms.  
24 MacDonald also urged the court to limit the duration for which  
25 the debtors could use cash collateral. And she argued for the  
26 imposition of strict accounting requirements consisting of weekly  
27 actual to budget reports. The court ultimately agreed with Ms.  
28 MacDonald on each of her points, ordering that: (i) estate funds

1 consisting of cash collateral could not be used to pay the  
2 current Mrs. Foulk; (ii) cash collateral could be used for  
3 limited payments to Dr. Foulk to allow for personal expenses;  
4 (iii) approved use of cash collateral in all three chapter 11  
5 cases would extend through November 2024; (iv) Village Oaks and  
6 El Dorado must account for their use of cash collateral in weekly  
7 actual to budget reports; and (v) Dr. Foulk must also file weekly  
8 reports accounting for his use of cash collateral.

9       Meanwhile, based on prepetition conduct in and associated  
10 with Ms. MacDonald's and Dr. Foulk's ongoing state court divorce  
11 proceeding, Ms. MacDonald also urged the court to remove each  
12 debtor from possession on the basis that all debtors lacked the  
13 capacity to serve as estate fiduciaries.<sup>5</sup> Ms. MacDonald's  
14 assertions caused the court to issue a June 25, 2024, order in  
15 the Village Oaks, El Dorado, and Foulk cases for the debtors to  
16 show cause why they should not be removed from possession.

17       Accepting the court's invitation for parties in interest to  
18 respond to the order to the show cause, Ms. MacDonald submitted a  
19 response which invoked 11 U.S.C. § 1185 as a basis for removing  
20 the debtors from possession. The response included hundreds of  
21 pages of points and authorities, argument, trial transcripts,  
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23       <sup>5</sup>The prepetition conduct included significant sanctions  
24 against Dr. Foulk issued by the divorce court and affirmed by the  
25 California Court of Appeal resulting from Dr. Foulk's scrupulous  
26 litigation and discovery tactics. It also included Dr. Foulk's  
27 transfer of the debtor entities' properties, Dr. Foulk's transfer  
28 of his interests in the debtor entities, and Dr. Foulk's transfer  
of a personal investment account valued at over \$300,000.00 all  
in close proximity to a divorce court judgment in excess of  
\$2,000,000.00 entered for Ms. MacDonald and against Dr. Foulk,  
Village Oaks, and El Dorado.

1 depositions, and § 341 testimony in support of removal. Although  
2 the court ultimately decided against removal, Ms. MacDonald's  
3 response made it clear that oversight was necessary. In that  
4 regard, Ms. MacDonald's response was instrumental in the court's  
5 decision to expand the powers of the subchapter V trustees  
6 appointed in each of the three bankruptcy cases to the fullest  
7 extent possible under 11 U.S.C. § 1183(b)(2). The subchapter V  
8 trustees were ordered to closely monitor the respective debtors  
9 as debtors in possession and they were also specifically  
10 instructed to report any breaches by any debtor in possession of  
11 any fiduciary obligation(s).

12 Ms. MacDonald's involvement in the bankruptcy cases includes  
13 participation in two additional matters limited to the Foulk  
14 case. First, she opposed Dr. Foulk's assumption of several  
15 commercial leases. Second, she successfully objected to Dr.  
16 Foulk's claim of exemptions obtaining a statement of non-  
17 opposition resulting in the claimed exemptions being disallowed.

### 18 19 **III.**

#### 20 **Analysis and Discussion**

21 The concession made during oral argument that aggregated  
22 debts exceed the \$7,500,000.00 subchapter V debt cap leaves two  
23 issues for consideration. The first is whether Ms. MacDonald  
24 waived her subchapter V eligibility objections. The second is  
25 whether Village Oaks and El Dorado are affiliated debtors.

26 Initially, the parties confuse "forfeiture" and "waiver."  
27 Whereas "forfeiture" is the failure to timely assert a right,  
28 "waiver" ordinarily means an intentional relinquishment or

1 abandonment of a known right or privilege. Resource Funding,  
2 Inc. v. Pacific Continental Bank (In re Washington Coast I, LLC),  
3 485 B.R. 393, 407 n.12 (9th Cir. BAP 2012).

4 Ms. MacDonald did not forfeit her right as a party in  
5 interest to object to the debtors' subchapter V eligibility  
6 because her objections were timely asserted. Bankruptcy Rule  
7 1020(a) states that "[i]n a voluntary chapter 11 case, the debtor  
8 shall state in the petition whether the debtor is a small  
9 business debtor and, if so, whether the debtor elects to have  
10 subchapter V of chapter 11 apply." Fed. R. Bankr. P. 1020(a).  
11 Bankruptcy Rule 1020(b) further states that "a party in interest  
12 may file an objection to the debtor's statement under subdivision  
13 (a) no later than 30 days after the conclusion of the meeting of  
14 creditors held under § 341(a) of the Code, or within 30 days  
15 after the amendment to the statement, whichever is later." Fed.  
16 R. Bankr. P. 1020(b).

17 Ms. MacDonald filed her eligibility objections within the  
18 time required by Fed. R. Bankr. P. 1020(b). The § 341(a)  
19 meetings in the Village Oaks and El Dorado cases concluded on  
20 July 18, 2024. The eligibility objection in the Village Oaks  
21 case was filed on August 19, 2024, and, thus, was filed 32 days  
22 after the § 341(a) meeting in that case concluded.<sup>6</sup> The  
23 eligibility objection in the El Dorado case was filed on August  
24 16, 2024, and, thus, was filed 29 days after the § 341(a) meeting  
25 in that case concluded. The § 341(a) meeting in the Foulk case  
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27 <sup>6</sup>The 30th day was August 17, 2024, which was a Saturday  
28 thereby effectively making the 30th day Monday, August 19, 2024.  
See Fed. R. Bankr. P. 9006(a)(1)(C).



1 concluded on July 29, 2024. The eligibility objection in the  
2 Foulk case was filed on August 28, 2024, and, thus, was filed 30  
3 days after the § 341(a) meeting in that case concluded.

4 Although not forfeited, the court could conclude that Ms.  
5 MacDonald waived her objection. An objection to a debtor's  
6 subchapter V designation-even when the debtor does not satisfy  
7 the eligibility requirements of 11 U.S.C. § 1182(1)(A)-is subject  
8 to waiver. In re 2022 East Anderson St., LLC, 2024 WL 1340655,  
9 at \*5 (Bankr. C.D. Cal. March 28, 2024) ("This Court is vested  
10 with the authority to . . . deem objections to the subchapter V  
11 designation waived, and allow the case to continue to proceed  
12 under subchapter V – even when, as in the present case, Debtor  
13 does not satisfy the eligibility requirements specified in 11  
14 U.S.C. 1182(1)(A)."). In that regard, waiver of subchapter V  
15 eligibility is not unlike waiver of chapter 13 eligibility under  
16 11 U.S.C. § 109(e). See Mission Hen, LLC v. Lee (In re Lee), 655  
17 B.R. 340, 352 n.7 (9th Cir BAP 2023) ("We also note that  
18 eligibility under § 109(e) is not jurisdictional and can be  
19 waived.") (citing FDIC v. Wenberg (In re Wenberg), 94 B.R. 631,  
20 636 (9th Cir. BAP 1988), aff'd, 902 F.2d 768 (9th Cir. 1990)).

21 The question, then, is how is an objection to subchapter V  
22 eligibility waived? 2022 East Anderson provides one answer,  
23 *i.e.*, by stipulation. In re 2022 East Anderson, 2022 WL 1340655  
24 at \*5. Mission Hen provides another answer, *i.e.*, if an  
25 objection is not made "before the parties have expended much  
26 time, effort, or money on the case." Id. at 352. Indeed, in  
27 Mission Hen the bankruptcy appellate panel noted that the secured  
28 creditor did not raise a chapter 13 eligibility objection until

1 "long after" the bankruptcy court held an evidentiary hearing and  
2 well into the case. Id. at 352 n.7. Noting that an eligibility  
3 determination at that juncture "would force the bankruptcy court  
4 to evaluate eligibility while completely ignoring all of the work  
5 it and the parties had done to value [p]roperty," id. at 352, the  
6 bankruptcy appellate panel concluded that "[t]he bankruptcy court  
7 could have held that Mission Hen's inexplicable delay amounted to  
8 a waiver of its eligibility argument." Id. at 352 n.7.

9 The take-away from Mission Hen is that an eligibility  
10 objection waiver may arise from the objecting party's litigation  
11 conduct which, in turn, requires a factual examination of the  
12 extent to which an objecting party knew it could object, failed  
13 to assert its objection, proceeded in the case, and raised the  
14 objection only after participating substantially in the case.  
15 Indeed, the United State Supreme Court said as much in Wellness  
16 International Network, Ltd. v. Sharif, 575 U.S. 665 (2015), in  
17 which it held that a party may impliedly waive a constitutional  
18 objection to the bankruptcy court's authority to enter a final  
19 judgment by its conduct in the case. The "conduct" to which the  
20 Supreme Court referred is, of course, the objecting party's  
21 "litigation conduct." See e.g., GPX Capital, LLC v. Argonaut  
22 Manufacturing Services, Inc. (In re Bioserv Corporation), 2024 WL  
23 4200575, at \*1 (9th Cir. Sept. 16, 2024); accord Arenas v. Inslee  
24 (In re Arenas), 2023 WL 3451028, at \*1 (9th Cir. May 15, 2023);  
25 Blixseth v. Glasser (In re Yellowstone Mountain Club, LLC), 656  
26 Fed.Appx. 307, 309 (9th Cir. July 22, 2016).

27 Ms. MacDonald knew there were subchapter V eligibility  
28 issues when she made her initial appearance in each bankruptcy

1 case. Indeed, she raised the eligibility issue in oppositions to  
2 the debtors' cash collateral motions filed within days of her  
3 initial appearance in each case. Over the course of the next  
4 three months, Ms. MacDonald participated in the Village Oaks, El  
5 Dorado, and Foulk cases. She appeared at every hearing. She  
6 also objected or responded to nearly every motion, application,  
7 or request by the debtors.

8 Ms. MacDonald's participation resulted in countless hours of  
9 attorney preparation, travel, and appearance time, at great  
10 expense to all parties. It has also resulted in a substantial  
11 investment by the court of its own judicial resources.

12 Through her participation, Ms. MacDonald invoked the Code  
13 and obtained relief favorable to her as a creditor- she  
14 acknowledged as much during oral argument. For example, through  
15 her objections to the debtors' cash collateral and wage payment  
16 motions, Ms. MacDonald successfully obtained an order from this  
17 court that: (i) restricted each debtors' permissible use of cash  
18 collateral; (ii) prohibited (as to Mrs. Foulk) and limited (as to  
19 Dr. Foulk) the use of cash collateral to pay insider salaries;  
20 (iii) limited the period of time each debtor is authorized to use  
21 cash collateral; and (iv) imposed strict accounting requirements  
22 on the debtors' use of cash collateral.

23 Ms. MacDonald also responded to the court's order to show  
24 cause why the debtors should not be removed from possession, and  
25 in her response, she invoked 11 U.S.C. § 1185 as the basis for  
26 removing all debtors from possession. The concerns that Ms.  
27 MacDonald raised in her response-and the depth of the response  
28 itself-resulted in an order in which the court expanded the

1 subchapter V trustees' powers to include oversight of each debtor  
2 in possession with a specific direction for the subchapter V  
3 trustees to report any misconduct or breach of fiduciary duties.

4 The salient point here is that from her initial appearance  
5 through the date of this memorandum decision Ms. MacDonald's  
6 participation in the Village Oaks, El Dorado, and Foulk cases, as  
7 subchapter V cases, has been extensive, substantive, and it has  
8 altered the trajectory of the bankruptcy cases. Ms. MacDonald  
9 admittedly knew upon her appearance in each of the cases there  
10 were subchapter V eligibility issues and, yet, over a period of  
11 several months she engaged the debtors, invoked the Code, and  
12 prevailed on a number of issues in the cases as subchapter V  
13 cases. Viewed in this context, the court could take its cue from  
14 Mission Hen and Wellness and hold that Ms. MacDonald's objections  
15 to the debtors' subchapter V eligibility have been waived.

16 But waiver is an equitable doctrine. Arellano v. McDonough,  
17 143 S.Ct. 543, 552 n.3 (2023); J&M Food Services v. Camel  
18 Investment, LLC (In re J&M Food Services, Inc.), 770 Fed.Appx.  
19 865, 866 (9th Cir. May 24, 2019). It is, of course, "incongruous  
20 to invoke equity when it would achieve an inequitable result[.]"  
21 Hayes v. Silver Queen Project, Inc., 922 F.2d 844, 1991 WL 1669,  
22 at \*3 (9th Cir. Jan. 10, 1991); see also Lott v. Louisville Metro  
23 Government, 2021 WL 1031008, at \*7 (W.D. Ky. March 17, 2021)  
24 ("[A] rule of equity . . . should not be applied if to do so  
25 reaches an inequitable result."). And therein lies the problem  
26 for the debtors.

27 Aggregated debts for purposes of the \$7,500,000.00  
28 subchapter V debt cap include those of the debtor and any

1 affiliates. See 11 U.S.C. § 1182(1)(A). Based on Dr. Foulk's  
2 100% ownership and control of Village Oaks and El Dorado, the  
3 parties do not dispute that Dr. Foulk and the debtor entities are  
4 affiliated debtors. See 11 U.S.C. § 101(2). The real question  
5 is whether the debtor entities are affiliates of each other. Ms.  
6 MacDonald asserts they are. The debtors assert they are not.  
7 The answer matters because of the oral argument concession that  
8 aggregated debts of the debtor entities exceed \$7,500,000.00  
9 subchapter V debt cap.

10 On the issue of the horizontal affiliate status of Village  
11 Oaks and El Dorado, the court agrees with Ms. MacDonald. In In  
12 re Opus East, LLC, 528 B.R. 30, 92 (Bankr. D. Del. 2015), aff'd,  
13 Burtch v. Opus, LLC (In re Opus East, LLC), 2016 WL 1298965 (D.  
14 Del. Mar. 31, 2016), aff'd, 698 Fed.Appx. 711 (3d Cir. Sept. 28,  
15 2017), the Delaware bankruptcy court cited In re Reichmann  
16 Petroleum Corp., 364 B.R. 916, 921 (Bankr. E.D. Tex. 2007), to  
17 illustrate the horizontal affiliate relationship as follows:

- 18 i. Striker owns at least 20% of the voting shares of  
19 Reichmann;
- 20 ii. Striker owns 70% of Emergent, which in turn owns  
21 100% of Freedom; therefore, Striker indirectly  
22 controls at least 20% of the outstanding voting  
23 shares of Freedom; and
- 24 iii. because Striker directly or indirectly owns or  
25 controls at least 20% of the outstanding voting  
26 shares of both Reichmann and Freedom, Freedom and  
27 Reichmann are, in fact, affiliates based upon the  
28 existence of the requisite horizontal relationship  
upon which affiliate status is conferred by the  
second prong of § 101(2)(B) of the Bankruptcy  
Code.

Opus East, 528 B.R. at 92; see also Winn-Dixie Stores, Inc. v.  
Eastern Mushroom Marketing Cooperative, 2021 WL 1907501, at \*2 &

1 \*12 (E.D. Pa. May 12, 2021) (noting that two corporations with  
2 same sole shareholder and president were affiliates of each other  
3 under 11 U.S.C. § 101(2)(B)). The same reasoning applies here.

4 Just as Striker's ownership of Reichman and Freedom made  
5 Freedom and Reichman horizontal affiliates in the example above,  
6 Dr. Foulk's 100% ownership and control of Village Oaks and his  
7 100% ownership and control of El Dorado makes Village Oaks and El  
8 Dorado horizontally-affiliated debtors here. The debtors'  
9 assertion that Village Oaks and El Dorado are not affiliated  
10 debtors is also belied by the record. Indeed, as Dr. Foulk  
11 successfully argued in reply to Ms. MacDonald's lease assumption  
12 opposition: "Ms. MacDonald does not appear to understand—or she  
13 chooses to ignore—that the three estates are inextricably linked.  
14 If you deprive one of cash . . . you may benefit the other two  
15 but, at the end of the day, it will be the same pot of cash that  
16 is available to pay creditors." Docket 176 at 2:28-3:3.

17 The concession that the aggregated debts of Village Oaks and  
18 El Dorado exceed \$7,500,000.00 subchapter V debt cap goes a long  
19 way to explain why Village Oaks would schedule the amount of its  
20 debt to First-Citizens as "unknown" and why El Dorado would omit  
21 its guarantor liability on that debt from its Schedules. Dr.  
22 Foulk knew the amount of the Village Oaks debt to First-Citizens  
23 Bank and he knew El Dorado's guarantor status on that debt when  
24 the Village Oaks and El Dorado Schedules were filed. Indeed, he  
25 disclosed both in the Schedules and in a declaration he filed in  
26 his own chapter 11 case two weeks earlier. Viewed in this  
27 context, and with the debtors unable to explain why known debt  
28 was not accurately and truthfully scheduled, it is apparent that

1 the debtors knew the aggregated debts of the debtor entities  
2 exceeded the \$7,500,000.00 subchapter V debt cap and they knew or  
3 anticipated that the debtor entities may be ineligible to be  
4 subchapter V debtors. So in an effort to manufacture subchapter  
5 V eligibility, or to at least make it more likely, the debtors  
6 manipulated debt in the Village Oaks and El Dorado Schedules to  
7 bring aggregated debts below \$7,500,000.00.

8 Applying the waiver doctrine under these circumstances would  
9 encourage-if not reward-the knowing and intentional use of false  
10 Schedules in which debt is manipulated to achieve subchapter V  
11 eligibility or at least make it more likely. It would also allow  
12 the debtor entities here to proceed under subchapter V when the  
13 debtors knew-or at least anticipated-that they were not-or that  
14 they may not be-eligible subchapter V debtors in the first  
15 instance. The court declines to apply the waiver doctrine to  
16 bring about these inequitable results. See In re Heart Heating  
17 and Cooling, LLC, 2024 WL 122837, at \*12 (Bankr. D. Colo. March  
18 21, 2024) (admonishing debtors for manipulating schedules by  
19 reducing debt and make subchapter V eligibility more likely); see  
20 also Tico Construction Company, Inc. v. Powell (In re Powell),  
21 --- F.4th ---, 2024 WL 4352615 at \*7 n.11 (9th Cir. Oct. 1, 2024)  
22 (stating that the bankruptcy court is not required to ignore  
23 falsity and bad faith of schedules in the eligibility context).  
24 The court will therefore sustain Ms. MacDonald's objections and  
25 the Village Oaks, El Dorado, and Foulk cases will be de-  
26 designated as subchapter V chapter 11 cases.

27 The debtors' intentional use of knowingly false Schedules in  
28 an effort to manufacture subchapter V eligibility-or make

1 subchapter V eligibility more likely-by manipulating debt also  
2 brings to the forefront another issue not discussed during oral  
3 argument but which the court may raise sua sponte and which is  
4 now relevant in light of this memorandum decision. And that is  
5 the appointment of a chapter 11 trustee in each of the three  
6 bankruptcy cases. Fukutomi v. United States Trustee (In re Bibo,  
7 Inc.), 76 F.3d 256, 258 (9th Cir. 1996) (court may raise  
8 appointment of a trustee sua sponte even if considered for the  
9 first time during a hearing unrelated to and not scheduled for  
10 the purposes of appointing a trustee).

11 The court considers the debtors' knowing and intentional use  
12 of false Schedules in which debts are manipulated to manufacture  
13 subchapter V eligibility to be the tipping point following its  
14 July 15, 2024, order and the prepetition misconduct cited in the  
15 order to show cause of June 25, 2024. At a minimum, because  
16 Schedules are filed under penalty of perjury, the use of false  
17 Schedules to manufacture subchapter V eligibility is dishonesty  
18 under 11 U.S.C. § 1104(a)(1). Considering the prepetition  
19 conduct that resulted in an expansion of the subchapter V  
20 trustees' powers, the appointment of a chapter 11 trustee is also  
21 now necessary to facilitate confidence in and trustworthiness of  
22 the debtors and management of the debtor entities making the  
23 appointment of a chapter 11 trustee in the interest of creditors  
24 under 11 U.S.C. § 1104(a)(2). See In re Euro-American Lodging  
25 Corp., 365 B.R. 421, 427 (Bankr. S.D.N.Y. 2007); In re Nat'l Farm  
26 Fin. Corp., 2008 WL 410236, at \*2 (Bankr. N.D. Cal. Feb. 12,  
27 2008).

28 At the end of the day, it is the debtors who bear the burden



1 of proving their purported subchapter V eligibility. NetJets  
2 Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC), 638 B.R. 403,  
3 413 (9th Cir. BAP 2022). "The burden of proof equates with the  
4 burden of persuasion and is accompanied by the correlative risk  
5 of non-persuasion." In re Tallerico, 532 B.R. 774, 790 (Bankr.  
6 E.D. Cal. 2015). The debtors have failed to meet that burden.  
7 Aggregated noncontingent liquidated debts of all debtors exceed  
8 the statutory cap for subchapter V eligibility in effect on the  
9 petition dates and, for the reasons explained above, the debtors  
10 have not persuaded the court it should apply the waiver doctrine  
11 to permit them to remain under subchapter V with debts admittedly  
12 in excess of \$7,500,000.00- vertically and horizontally.

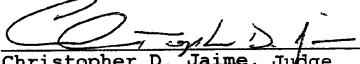
#### 14 IV.

#### 15 Conclusion

16 For the foregoing reasons, Ms. MacDonald's objections to the  
17 debtors' subchapter V eligibility at (i) Docket 185 in the  
18 Village Oaks case, (ii) Docket 215 in the El Dorado case, and  
19 (iii) Docket 186 in the Foulk case are **SUSTAINED**. The Village  
20 Oaks, El Dorado, and Foulk chapter 11 cases will be de-designated  
21 as subchapter V cases and will not proceed under subchapter V  
22 from and after the date of the order entered on this memorandum  
23 decision. The subchapter V trustees are discharged. The court  
24 will address the appointment of a chapter 11 trustee in the  
25 Village Oaks, El Dorado, and Foulk cases on November 5, 2024, at  
26 11:00 a.m.

27 A separate order will issue.

28 Dated: October 11, 2024

  
Christopher D. Jaime, Judge  
United States Bankruptcy Court

**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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